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IN THE

Supreme Court of the United States

DOMINO'S PIZZA, LLC, DOMINO'S PIZZA, INC., AND DEBBIE PEAR,

Petitioners,

v.

JOHN MCDONALD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, NATIONAL MINORITY SUPPLIER DEVELOPMENT COUNCIL, INC., NAACP LEGAL DEFENSE AND EDUCATION FUND, NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, AND LEGAL MOMENTUM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

May the sole shareholder of a corporation who is the target of intentional racial discrimination in the performance and enforcement of a contract, and who suffers separate and distinct injury as a result thereof, maintain a cause of action for personal injuries under 42 U.S.C. § 1981?

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INTEREST OF THE *AMICI CURIAE* [1]

The Lawyers' Committee for Civil Rights Under Law, the Minority Business Enterprise Legal Defense and Education Fund, the National Minority Supplier Development Council, Inc., the NAACP Legal Defense and Educational Fund, Inc., and the National Asian Pacific American Legal Consortium submit this brief as *amici curiae* with the consent of the parties, in support of Respondent's argument that an individual who is the actual target of a discriminatory actor's racially motivated breach of a contract can bring suit under 42 U.S.C. § 1981 for the damages he suffers even if he is not a formal party to the contract.

Amici are nonprofit organizations devoted to helping minorities and minority-owned businesses participate fully in the mainstream of American economic life. As courts and legislatures throughout the country have recognized, there is a long-standing pattern and practice of racial discrimination directed at minorities and minority business owners. The Court's decision will determine the extent to which § 1981 protects the individual rights of business owners to be free from intentional racial discrimination. *Amici* strongly believe, and the language and intent of § 1981 recognizes, that the protections of § 1981 are vital to addressing the distinct disadvantages that minority business owners face as a result of discrimination in the marketplace. Because this Court's decision will have a profound impact on the rights of minority business owners throughout the country, *amici* wish to present their views concerning the scope of § 1981's protections.

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staffs, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonprofit civil rights organization that was formed in 1963 at the request of President Kennedy in order to involve private attorneys throughout the country in the national effort to ensure the civil rights of all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country. The Lawyers' Committee is interested in ensuring that the goal of civil rights legislation, to eradicate discrimination, is fully realized, and is concerned in this case with the ability of 42 U.S.C. § 1981 to protect business owners from unlawful racial discrimination.

The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote and protect programs and policies that provide opportunities for minority businesses to grow and thrive and to contribute to our communities and national economy. MBELDEF provides legal advocacy for minority businesses, over three quarters of which are single shareholder corporations or sole proprietorships according to Census Bureau surveys.

The National Minority Supplier Development Council, Inc. ("NMSDC") is a nonprofit corporation founded in 1979 that seeks to provide minority businesses access to purchasing opportunities in the public and private sectors. Currently, NMSDC has 39 regional offices and a national office that coordinate these efforts on a local and national level. Over 60% of NMSDC certified minority businesses are incorporated and 75% of the certified minority businesses specializ-

ing in construction are corporations. A large percentage of NMSDC certified incorporated businesses have fewer than 3 shareholders and many have only one.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York formed to redress injustice caused by racial discrimination and to assist African-Americans in securing their constitutional and statutory rights. For over six decades, LDF attorneys have represented parties in litigation before this Court and the lower courts on matters of race discrimination in general, and employment discrimination in particular, including in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1988); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). LDF attorneys also litigated important cases regarding standing to assert civil rights claims, including *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *NAACP v. Alabama*, 357 U.S. 449 (1957); and *Barrows v. Jackson*, 346 U.S. 249 (1953).

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, NAPALC and its Affiliates, the Asian American Institute, Asian Law Caucus and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing interest in racial discrimination issues that have an impact on the Asian American community, and this interest has resulted in NAPALC's participation in a number of amicus briefs before the courts.

Legal Momentum (the new name of NOW Legal Defense and Education Fund) advances the rights of women and girls

by using the power of the law and creating innovative public policy. Legal Momentum is committed to vigorous enforcement of the civil rights laws to eradicate all forms of discrimination, including race discrimination. It is particularly interested in this case because § 1981 provides a crucial guarantee of nondiscrimination to the hundreds of thousands of women of color who own small businesses.

The resolution of this case will have a significant effect on the extent to which the *amici* can protect the rights of their clients.

SUMMARY OF ARGUMENT

In the present case, the Court is called on to determine the proper scope of one of the nation's oldest and most important civil rights laws, 42 U.S.C. § 1981, which bars all intentional racial discrimination in the making, performance, and enforcement of contracts. Respondent John McDonald ("McDonald"), an African-American and the sole shareholder and operator of JWM Investments, Inc. ("JWM"), filed suit under § 1981 when Petitioners, Domino's Pizza, LLC, Domino's Pizza, Inc. and Debbie Pear, terminated a construction contract with JWM because McDonald is black.[2] As a direct result of Petitioners' intentional discrimination, McDonald—the target of that discrimination—suffered severe physical, emotional and financial injuries distinct from the injuries suffered by JWM. The Ninth Circuit held that McDonald had stated a valid cause of action under § 1981 for his personal injuries.

The Ninth Circuit's decision fits squarely within the parameters of the language of § 1981, comports with decades of case law interpreting that statute, and furthers Congress'

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[2] These facts must be taken as true, because this case comes before the Court on a motion to dismiss. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

clearly expressed purpose in enacting the law and amending it in 1991. By its terms, § 1981 prohibits, without exception, *all* discrimination in the making, performance and enforcement of contracts. The courts applying this prohibition have consistently interpreted § 1981 to provide remedies for every class and category of personal, as well as corporate, injury flowing from intentional racial discrimination. This expansive approach to the application of § 1981 is grounded in the unambiguous intention of Congress to provide full relief to those who are the targets of discriminatory actions in the area of commercial contracts. Indeed, § 1981 reflects the unambiguous determination of Congress to foster the participation of newly freed slaves in the marketplace by protecting them from discrimination and harassment in contracting. It was passed as a response to widespread acts of violence and intimidation aimed at creating an economic environment that was hostile to black participation. It was designed from its inception to broadly protect the economic interests of minority individuals and to enable them to enter and enforce contracts in a society free from discrimination.

The core historical purpose of § 1981 was to offer *full* protection to *individuals*, like John McDonald, from the "terrible humiliation, pain and suffering" of intentional racial discrimination in contracting. H.R. Rep. No. 102-40 (Pt. I), at 14-15 (1991). The decision below adheres to this core principle by permitting individuals who are the target of discrimination in contracting to seek redress for the personal injuries they suffer, regardless of whether the subject contract was signed by the individual in his personal capacity or as the sole shareholder and only employee of a corporation.

Recognizing that victims of intentional racial discrimination have a cause of action for their personal injuries under the circumstances presented in this case is consistent with Congress' intention that § 1981 foster minority participation in the marketplace. It would be more than unfortunate if millions of minority business owners like McDonald were

forced to choose between the advantages of the corporate form and the availability of remedies for personal injuries resulting from violations of their civil rights. Minority business owners should not be forced to check their race at the door. The Court should thus affirm the decision below.

ARGUMENT

I. THE "BROAD AND SWEEPING NATURE" OF SECTION 1981 PROVIDES RELIEF FOR THE INJURIES INDIVIDUALS SUFFER AS A RESULT OF INTENTIONAL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS

Section 1981 "was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts." *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273, 295 (1976). The protections and remedies provided by § 1981 have become an "important part of the fabric of our law." *Runyon v. McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J., concurring). Although these protections concern the right to contract, § 1981 does not and was never intended to merely replicate the remedies that commercial law provides for breaches of contract. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987) (noting "Section 1981 has a much broader focus than contractual rights"), *superceded by statute on other grounds*, 28 U.S.C. § 1658. Rather, § 1981 serves the constitutional imperative of eradicating the badges of slavery and compensating victims of intentional discrimination, like McDonald, for the severe physical, emotional and financial injuries that they suffer. H.R. Rep. No. 101-644 (Pt. I), at 8 (1990); H.R. Rep. No. 102-40 (Pt. I), at 14-15; *Burnett v. Grattan*, 468 U.S. 42, 53 (1984) (noting "[t]he goals of the federal [civil rights] statutes are compensation of persons whose civil rights have been violated"). Without question, the primary goal of § 1981 is to protect human beings from discrimination.

A. The History of Section 1981 Demands a Broad Interpretation

Section 1981 was derived from § 1 of the Civil Rights Act of 1866 (14 Stat. 27). *Runyon*, 427 U.S. at 168-69; H.R. Rep. No. 101-644 (1990). As this Court has noted, that Act was "cast in sweeping terms." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968). From the beginning, the protections of § 1981 were focused on securing fundamental civil rights for individuals subject to discrimination. Indeed, the most immediate goal of the Act was to remedy discrimination that freed slaves faced in the wake of Reconstruction and the Thirteenth Amendment. *Id.* at 432. The Act was created against a landscape of intense persecution, intimidation, and harassment aimed at preventing African-Americans from enjoying the full benefits of the American economy. As Senator Trumbull of Illinois, the Chairman of the Judiciary Committee, said in 1866:

> [the Thirteenth Amendment] declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits.

See id. at 431-32 (quoting Cong. Globe, 39th Cong., 1st Sess., 43).

Although the immediate goal of the Civil Rights Act of 1866 was to secure equal rights for freed slaves, this Court has held that the overall purposes of the statute were much broader. "[T]he statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and

immediate plight of the newly freed Negro slaves." *McDonald*, 427 U.S. at 296. Rather, "the Act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *Id.* at 295.

The Court has previously rejected attempts to narrowly interpret the "great fundamental rights" secured by the Civil Rights Act of 1866:[3]

> A narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 [and § 1981] was derived.[4]

Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969) (allowing a white property owner to bring suit based on the exclusion of his African-American tenant from a community recreation center because "the white owner is at times the only effective adversary of the unlawful restrictive covenant"); *see also Alfred H. Mayer*, 392 U.S. at 431 (noting that the legislative history describing the objectives and terms of the Civil Rights Act of 1866 "belie[s] any attempt to read it narrowly"). Several Circuit Courts of Appeals have noted that civil rights laws such as § 1981 cannot be mechanically applied, but rather must be liberally construed to achieve Congress' broad remedial purposes. *See, e.g., Chavis v. Clayton County School Dist.*, 300 F.3d 1288, 1292 (11th Cir. 2002) ("[T]he Reconstruction civil rights acts . . . are to be 'accord(ed) [] a sweep as broad as (their) language.'")

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[3] The one exception was *Patterson v. McLean Credit Union*, 491 U.S. 164 (1988), to which Congress immediately responded by amending § 1981 to make clear its broad reach. *See infra* Section I.B.

[4] This Court has noted that §§ 1981 and 1982 are both derived from the Civil Rights Act of 1866 and there is "no reason to construe these sections differently." *Runyon*, 427 U.S. at 171 (citing *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973)).

(quoting *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971)); *Trainor v. Apollo Metal Specialities*, 318 F.3d 976, 983 (10th Cir. 2002) ("In our review of the antidiscrimination laws we must be mindful of their remedial purposes, and liberally interpret their provisions to that end."); *Puryear v. County of Roanoke*, 214 F.3d 514, 522 (4th Cir. 2000) (stating that when applying a remedial statute, "courts must construe the legislation broadly to effect its purposes").

B. Congress Reiterated Section 1981's Broad Reach in the 1991 Amendments

Congress also has left no misimpression about the broad and enduring remedial purposes of § 1981. In 1991, Congress amended the statute in response to the Court's holding in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, the Court narrowly applied the terms of § 1981 to hold that the prohibition on discrimination in the "making" of a contract did not extend to discrimination in the performance of a contract. *Id.* at 176-77. In the 1991 amendments, Congress disagreed with this mechanical application of § 1981's terms. Congress was particularly concerned that a gap not be created in the broad protections and remedies provided to the individuals harmed by intentional racial discrimination. The amendments' legislative history indicated that *Patterson* prevented "victims of intentional discrimination [from being made] whole for physical and emotional injury resulting therefrom." H.R. Rep. No. 101-644 (Pt. I), at 18 (1990) (noting also that *Patterson* gave employers "free rein to discriminate against their employees once they are hired"). Foreshadowing the claims in this case, Congress noted that "[v]ictims of intentional discrimination often endure terrible humiliation, pain and suffering while on the job. This distress often manifests itself in emotional disorders and medical problems, which in turn cause victims of discrimination to suffer substantial out-of-pocket medical expenses and other eco-

nomic losses as a result of the discrimination." H.R. Rep. No. 102-40, at 14-15 (1991). Accordingly, the 1991 amendments defined § 1981's use of the phrase "make and enforce contracts" to include the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

Thus, the 1991 amendments were intended to ensure that § 1981 provided full remedies for the injuries suffered by victims of intentional discrimination in any aspect of the contractual relationship. Congress made clear that it intended to "strengthen existing remedies to provide more effective deterrence and ensure compensation commensurate with the harms suffered by victims of intentional discrimination." *Id.* at 18. Congress noted that it intended § 1981 to "bar *all* race discrimination in contractual relations." *Id.* at 92 (emphasis added).

II. A NARROW READING OF SECTION 1981 CONTRADICTS ITS INTENDED PRACTICAL PURPOSE OF PROTECTING INDIVIDUALS AGAINST INTENTIONAL DISCRIMINATION

Petitioners claim that McDonald is not entitled to be made whole for injuries squarely within the ambit of § 1981 protection because he opted to make and enforce the contracts at issue using the corporate form for his business. Under Petitioners' proposed limitation of § 1981, McDonald has injury but no standing, while his corporation has standing but only limited injuries. This limitation holds great advantages for parties engaged in intentional discrimination because the corporation is unable to recover for the severe physical, emotional and financial injuries often suffered by those personally harmed as a direct result of discrimination. This crabbed analysis creates a broad gap in the protections of § 1981, denying individual remedies to

victims of intentional discrimination who operate their businesses in the corporate form.

The constriction of § 1981 claims advocated by Petitioners is inconsistent with the broad remedial purpose of the statute because it would: (a) deny relief to individuals who were the actual targets of intentional discriminatory contract enforcement; (b) ignore the separate and distinct injuries that individuals suffer from discrimination in the enforcement of contracts; (c) compromise the remedial goals of the statute by importing elements of contract law inimical to the statute's expansive goals; and (d) force minority victims of discrimination to forfeit remedies for actual injury in order to obtain the advantages of the corporate form.

A. Where an Individual is the Target and Direct Victim of Discrimination in the Making and Enforcement of a Contract Executed by a Corporation He Owns, He is Entitled to Relief Under Section 1981

McDonald is a direct victim of discrimination. Petitioners intentionally discriminated *against McDonald* on the basis of *his* race. Petitioners terminated their contracts with McDonald's corporation because *McDonald* is African-American. McDonald is the sole shareholder, director, and officer of JWM and the only person who interacted with Petitioners in making and attempting to enforce the contracts. Because Petitioners did not want to do business with McDonald on the basis of his race, they terminated their contracts with the company that he owns and operates. *McDonald* suffered severe physical, emotional and financial injuries *as a direct result of Petitioners' discrimination.*

McDonald is asserting his individual right to be free from racial discrimination and is seeking redress for the personal harms that he suffered as a result of the intentional discrimination Petitioners targeted at him. McDonald is *not*

asserting the legal rights of a third party, *i.e.*, JWM, nor is he seeking to benefit as a third party beneficiary from the contract between JWM and Petitioners. The harms that McDonald suffered were not suffered by JWM. No one is in a better position than McDonald himself to seek redress for the personal indignities and harms that he suffered as a result of Petitioners' discriminatory conduct towards him.

This Court has found standing where there is injury-in-fact and "the interest sought to be protected by the complainant is arguably within the zone of interests sought to be protected or regulated by the statute." *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-54 (1970) (finding standing because plaintiffs' interests were within the zone protected under the Bank Service Corporation Act). Here, McDonald is clearly within the zone of interests protected by § 1981.[5] He is an African-American who was subjected to discrimination during the performance and enforcement of four contracts with Petitioners, and thus is *exactly* the type of person that Congress intended to protect under § 1981. The statute was enacted to protect the individual right to be free from discrimination. *See supra* Section I. As this Court has explained, § 1981's command that "competence and capacity to contract shall not depend on race" is "part of a federal law barring racial discrimination, which . . . is a fundamental injury to the *individual* rights of a *person*." *Goodman*, 482 U.S. at 661 (emphasis added).

For minority-owned single shareholder corporations like McDonald's, while the corporation can suffer certain economic effects from discrimination, the target of the discrimination is the individual who interacts with the dis-

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[5] The analysis would not differ under the alternative standard of whether the "statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

criminatory actor. This Court's jurisprudence, as well as common sense, dictates that "a corporation . . . has no racial identity and cannot be the direct target of the petitioners' alleged discrimination." *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 (1977). A corporation is entitled to sue under § 1981, however, when it is harmed because of its relationship with a member of a protected class. *See, e.g., Gersman v. Group Health Assoc.*, 931 F.2d 1565, 1568 (D.C. Cir. 1991) (holding that a corporation has standing to litigate because it can suffer harm from discrimination), *rev'd on other grounds*, 502 U.S. 1068 (1992); *Hudson Valley Freedom Theater v. Heimbach*, 671 F.2d 702, 708 (2d Cir. 1982) (holding that a corporation that is harmed by discriminatory action has standing to litigate that harm).

While allowing a raceless entity such as a corporation to sue is appropriate given the broad purposes for which Congress enacted § 1981, restricting § 1981 so that ONLY the corporation can sue would eviscerate the law's core purpose of protecting the *individual's* right to be free from discrimination in the making and enforcement of contracts. McDonald *is* a member of the protected class under § 1981 and was the direct target of Petitioners' racial discrimination, regardless of whether he was acting in his individual capacity or as an agent for his corporation. In the case of a corporation with a single shareholder and operator, it is only that individual's racial identity that is at issue. If the discriminatory actor does not like the shareholder's race and does not want to do business with that individual, the decision not to enter into or honor contracts with the corporation is based on prejudice towards the individual.

In the present case, Petitioners discriminated against McDonald as an individual and he is entitled to redress for personal injuries that fall clearly within the zone of interests that § 1981 protects.

B. Limiting Relief to the Corporation's Injuries Ignores the Harm Caused to Individuals by Discrimination in the Enforcement of the Contract

When intentional discrimination in contracting is targeted at and causes injuries to the sole shareholder and operator of a corporation, the human victim of the discrimination would not be recognized or made whole if only the corporation could bring a lawsuit under § 1981. In enacting § 1981, Congress recognized that civil rights laws must address the injuries that individual victims of intentional discrimination often suffer, including humiliation, pain, suffering, emotional disorders, medical problems, and accompanying medical expenses and other economic harm. *See* H.R. Rep. No. 102-40, at 14-15 (1991). These injuries are separate and distinct from any injuries that a corporation might suffer as a result of discrimination.

In keeping with the fundamental purpose of the statute and the undeniable realities of the potential harms of discrimination, courts have allowed individuals to recover for the emotional and mental harms they suffered as a result of intentional discrimination. *See, e.g., Bryant v. Aiken Reg'l Med. Ctrs.*, 333 F.3d 536, 546-47 (4th Cir. 2003) (affirming lower court award of damages to victim of intentional discrimination for injuries including "emotional distress"); *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1238 (D.C. Cir. 1984) (affirming lower court award of damages to victim of intentional discrimination for injuries including "humiliation and other emotional harm"); *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019, 1021 (9th Cir. 1983) (affirming lower court award of damages to victim of intentional discrimination for injuries including "humiliation and embarrassment"). These are precisely the types of injuries that McDonald has alleged that he, not JWM, suffered due to Petitioners' discriminatory actions. As a

direct result of Petitioners' discrimination, McDonald suffered the loss of his reputation, his business, his credit rating, and his health. Contract recovery for JWM would not even begin to compensate McDonald for his injuries.

Petitioners' interpretation of § 1981 would deny the individuals who are the targets of discrimination redress for harms that they uniquely suffer. This interpretation would vitiate the remedy for harm inflicted upon the human target of discrimination, simply by virtue of the fact that the victim utilized the corporate form in executing his contract. Such an interpretation would turn a blind eye to egregious racial harassment of the sole shareholder of a corporation so long as such harassment did not result in an injury to the corporation.

C. Corporate Law Principles That Govern Remedies for Contractual Breach Should Not Be Imported into Civil Rights Law so as to Defeat the Broad Remedial Purposes for Which They Were Enacted

This Court should not interpret unrelated principles of corporate and contract law to defeat the broad remedial purposes of the civil rights laws. As noted above, in passing and amending § 1981, Congress intended to prohibit *all* intentional discrimination in contractual relationships. *See supra* Section I. This remedial goal is not qualified. Nothing in the language or history of § 1981 suggests that its application should vary based on whether, as a matter of corporate law, a person operates as a sole proprietorship, a corporation, a limited liability company, a partnership, a limited liability partnership, or any number of other business entities.

Minority individuals must be allowed remedies for intentional racial discrimination in the enforcement of contracts, irrespective of their decision to contract as a corporate entity. Three circuits below reached the opposite conclusion

relying upon a purely mechanical application of concepts drawn from the body of law governing traditional remedies for breach of contract.[6] Although § 1981 concerns the making and enforcement of contracts, it is neither part of the commercial code nor an articulation of contract law remedies. Rather, § 1981 is a broad and prophylactic effort to advance constitutional guarantees through remedial legislation whose sole purpose was to free individuals from the burdens of discriminatory action. These protections should not be subject to caveat or qualification based on corporate or contract law principles engrafted on legislation designed to serve entirely different goals. Congress did not intend to draw artificial distinctions between essentially identical victims of discrimination based solely on whether they sign contracts as a corporation or a sole proprietorship.

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[6] The First, Fifth and Tenth Circuits have engaged in such analysis. *See Danco, Inc. v. Wal-Mart Stores*, 178 F.3d 8, 14 (1st Cir. 1999) (refusing an individual cause of action because the "suffering [to the individual], however real, is not automatically damage to [the corporation]"); *Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562, 565 (5th Cir. 1990) (refusing an individual cause of action because shareholders do not have rights to raise claims in place of a corporation); *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1072 (10th Cir. 2002) (refusing an individual cause of action because "a stockholder cannot maintain a personal action against a third party for harm caused to the corporation"). With only minimal explanation, these courts elevate corporate form over civil rights law by resolving the debate based on whether the § 1981 plaintiff is a formal signatory to the contract. *E.g., Danco*, 178 F.3d at 14 (explaining, "not surprisingly, that the contract in question was between [defendant] and [the corporation]," not the sole shareholder). Their holdings are problematic for two reasons. First, requiring that § 1981 plaintiffs are formal signatories goes well beyond any of the "make and enforce" language in the statute. Second, and perhaps more disturbing, these courts have essentially abdicated their duty to conduct a thorough examination of the issues and have failed even to *offer* a plausible rationale for allowing a legal fiction—the corporate form—to trump important federal rights.

Section 1981's human focus is at odds with any attempt to subject it to a mechanical application of corporate or contract law principles that are foreign to the origin and purpose of this civil rights law.[7] To engraft the remedial limitations of corporate or contract law on a federal civil rights statute so as to limit recovery for intentional discrimination defeats the Congressional intent. There is simply no principled support for the proposition that corporate form was ever intended to be the determinative factor in the availability of § 1981 relief for injury stemming from racial discrimination or a basis to subordinate the intentionally broad purpose of civil rights laws to the mechanical application of state corporation laws.

D. Creating Artificial Distinctions Between Victims of Discrimination Would Force Minority Business Owners to Choose Between Their Civil Rights and the Protection of the Corporate Form

Limiting standing under § 1981 to the corporate entity, in situations where a minority business owner has chosen to incorporate and then suffered intentional racial discrimination in the performance of a contract, would result in unequal

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[7] Even if it were appropriate to do so, however, a strict application of corporate law principles to § 1981 would not limit standing to corporate entities when intentional discrimination was targeted at the owner of that entity. McDonald has suffered a separate and distinct injury from that suffered by the corporate entity. *See infra* Section III.A (discussing "separate and distinct" injury doctrine). When a shareholder suffers such an injury, even if the corporate entity is harmed by the same act, corporate law allows the shareholder to bring a direct tort or other action against the third party that caused the harm. *See id.* Section 1981 is backed by a constitutional imperative to protect human dignity and promote economic advancement. It cannot be the case that a racial minority has less of a right to bring an action under § 1981 than he does to bring common law or state statutory claims as to which Congress has no interest and the constitution generates no imperative.

application of the civil rights laws to virtually identical victims of discrimination. Those who enter "personal contractual relationship[s]," Petitioners' Brief ("Pet. Br.") at 39, would be entitled to remedies for their injuries. By contrast, a person who enters the same contract, endures the same discrimination, and suffers the same injuries would have no remedies under § 1981 if he or she operates the business as a corporation. Sole shareholders should not be required to check their race at the door in order to obtain the protections of the corporate form. The civil rights laws, designed to protect individual dignity and deter harmful discrimination, do not turn on such technical distinctions of corporate law.

If the Court were to narrow the application of § 1981 based on such artificial distinctions, members of protected classes would be presented with a Hobson's choice between relinquishing their civil rights and operating their businesses subject to unlimited personal liability. Such a narrowing of the application of § 1981 would add one additional barrier to the growth and expansion of minority businesses, a class of businesses that already faces widespread discrimination in today's marketplace.[8] Section 1981, which was specifically designed to remedy discrimination in the economic world, should not be interpreted to require racial minorities to abandon their civil rights if they seek to advance their economic interests via incorporation.

The ability to incorporate is vital for minority-owned small businesses. Incorporation "facilitate[s] legitimate business transactions, eliminate[s] unreasonable liabilities and at the

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[8] *See, e.g., Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., et al.*, 345 F.3d 964, 969-71 (8th Cir. 2003); *Concrete Works of Colo. v. City and County of Denver*, 321 F.3d 950, 960-70 (10th Cir. 2003); *Adarand Constructors v. Slater*, 228 F. 3d 1147, 1167-74 (10th Cir. 2000); *Northern Contracting v. Illinois, et al.*, No. 00-C-4515, 2004 WL 422704, at *13-17 (N.D. Ill. Mar. 3, 2004); *Builders Ass'n of Greater Chicago v. City of Chicago*, 298 F. Supp. 2d 725, 742 (N.D. Ill. 2003).

same time safeguard[s] the investor, the creditor and those dealing with the corporation." 1 Fletcher Cyclopedia Corporations § 2.10, pps. 10-11. The limited liability aspect of the corporate form was designed to facilitate the economic advancement of society. Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 Nw. U. L. Rev. 148, 163 (1992) ("[L]imited liability came about because of a wish to further economic progress and to maximize state wealth through encouraging investment."). Limited liability is particularly important for small businesses, which represent the vast majority of businesses owned by racial minorities. Indeed, it has been noted that:

> [A]n . . . important factor contributing to limited liability's present stronghold in American corporate law was a desire to encourage individual investment in smaller firms. It is of a piece with other nineteenth-century manifestations of rugged individualism, and reflects a traditional American policy to favor the small-scale entrepreneur. Limited liability, insofar as it reflects a venerable desire to help out smaller investors, those more typical of the people, thus reflects democracy as much as economics. Perhaps, then, limited liability ought to be most sacred for smaller firms, and not those possessing great economic wealth.

Id.

A recent study by the Ewing Marion Kauffman Foundation (the "Kauffman Study") concluded that minority businesses are not maintaining pace with the larger U.S. business community.[8] It is no secret that minority businesses in the U.S. have historically experienced severe impediments to business formation and growth—they are generally smaller

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[8] The Boston Consulting Group, *The New Agenda for Minority Business Development*, at 1-3 (June 2005).

in size[9] and disproportionately fewer in number than their white counterparts.[10] In order to succeed, existing minority businesses must be prepared to form strategic alliances, participate in mergers and acquisitions, and access the capital markets. In reality, however, most minority businesses today disproportionately operate as sole proprietorships: 82% of minority businesses are sole proprietorships versus 71% of non-minority firms.[11] The Kauffman Study makes clear that in order to compete in today's global economy, these sole proprietorships must increasingly take advantage of the protections afforded by doing business in the corporate form.

Denying standing under § 1981 to victims of intentional discrimination who opt to make, perform and enforce contracts through a corporation would force minority business owners to choose between their civil rights and the benefits of the corporate form. Such a result would be inconsistent with the goals of § 1981. *See supra* Section I.

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[9] Seventy-nine percent of minority businesses do not have paid employees and, of those that have paid employees, 69% have fewer than nine. U.S. Small Business Administration, Office of Advocacy, *Minorities in Business*, at 15 (Nov. 2001).

[10] This is not to say that minority businesses and small businesses alike do not have the capacity to complete large construction contracts. To the contrary, the Court of Appeals in *Concrete Works of Colo. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), found that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of minority- and women-owned businesses are, themselves, the result of industry discrimination. *Id.* at 981, 990-92. In fact, the trial court there found that most firms have few full-time permanent employees and must grow or shrink their performance capacity according to the volume of business they are doing. *Id.* at 981 (upholding the constitutionality of Denver's minority and women business enterprise program).

[11] *See* Kauffman Study at 31.

III. ALLOWING THE DIRECT AND TARGETED VICTIMS OF DISCRIMINATION TO SUE WILL NOT LEAD TO A FLOOD OF LAWSUITS

Petitioners and their *amici* wrongly suggest that affirming the Ninth Circuit's decision will result in a deluge of civil rights lawsuits by virtually any person, no matter how tenuous their relationship to the alleged discrimination. According to Petitioners, the Ninth Circuit's holding allows anyone tangentially related to the contract to sue under § 1981 and radically expands the class of potential plaintiffs to an "essentially limitless" number. Pet. Br. at 37. The Court must not fall prey to such scare tactics. In reality, the Ninth Circuit's holding is limited in two important respects. First, the ruling expressly restricts § 1981 standing to persons who have suffered a *separate and distinct* injury from that of the corporation. Second, the facts of the case limit its import to plaintiffs who are the direct targets of discrimination (not mere bystanders) and who own and operate their own businesses.

A. The Ninth Circuit's Holding Requires a Separate and Distinct Injury

The Ninth Circuit's ruling requires every individual plaintiff bringing a claim under § 1981 to show injuries that are distinct from that of the corporation. *See McDonald v. Domino's Pizza*, 107 Fed. Appx. 18, 19 (9th Cir. 2004). In doing so, the court relied on *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019 (9th Cir. 1983). In *Gomez*, plaintiff and his corporation were denied a contract to provide hospital services because he and his employees were Hispanic and the hospital was wary of "too many brown faces." *Id.* at 1020. The plaintiff sued under § 1981 for personal injuries that were distinct from the corporation's injuries, including loss of employment as director of the defendant's emergency room, humiliation and embarrassment. *Id.* at 1021. The court allowed the plaintiff to bring his

claim because he suffered a distinct and palpable injury and his interests were within the zone of interests to be protected by § 1981. *Id.* This comports with a long line of cases allowing shareholders to sue for injuries that are unique to them. *E.g.*, *Franchise Tax Bd. of California v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990) (recognizing that an exception to the "longstanding equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation" allows "a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated"); *see also Ritchie v. McMullen*, 79 F. 522, 524 (6th Cir. 1897); *Cunningham v. Kartridg Pak Co.*, 332 N.W.2d 881, 883 (Iowa 1983); *R. G. Dun & Co. v. Shipp*, 91 S.W.2d 330, 331 (Tex. 1936); *Vierling v. Baxter*, 141 A. 728, 729 (Pa. 1928).

Like *Gomez*, there is no dispute that McDonald has alleged injuries that are personal to him and distinct from any injuries suffered by JWM. He is not seeking to step into the corporation's shoes—rather, he is seeking redress for his own damages, which include the loss of bank financing, injury to his personal credit, injury to his ability to acquire homeowners' insurance, emotional distress, and personal medical problems.

Thus, the Ninth Circuit's decision provides no support for plaintiffs who bring individual § 1981 claims alongside corporations in federal courts without alleging a separate and distinct injury. For example, although the plaintiff in *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 277 (5th Cir. 1997), brought suit in an individual capacity, he did not allege personal injuries but sought rather to recover only the economic losses suffered by his corporation. Similarly, in *Edwards*, *Gersman*, and *Smith*, the plaintiffs failed to allege personal injuries resulting from discrimination that were distinct from the corporation's injury. *See Edwards v. Walter Jones Const. Co.*, No. 98-4366, 2000 WL 302710, at *1 (6th

Cir. Mar. 17, 2000); *Gersman v. Group Health Assoc.*, 931 F.2d 1565, 1569 (D.C. Cir. 1991), *rev'd on other grounds*, 502 U.S. 1068 (1992); *Smith v. Martin*, 542 F.2d 688, 690 (6th Cir. 1976). It is well settled that a shareholder cannot maintain a personal action for harm caused to his corporation. *E.g., Alcan Aluminium*, 493 U.S. at 336. Because Petitioners' cast of hypothetical and remotely related plaintiffs would not be able to show a separate and distinct harm from the corporation, they would not be enabled by the Ninth Circuit's decision.

B. The Import of this Case is Limited to Plaintiffs Who are Direct Targets of Discrimination and Who Own and Operate Their Own Businesses

McDonald was not "tangentially related," "incidental," or "merely an affiliate" of JWM as Petitioners and its *amici* insist—indeed, for all practical purposes, McDonald *was* JWM. JWM was a close corporation, wholly owned by McDonald and operated by him as owner. McDonald is the person who negotiated, created, and performed the contracts. He was solely responsible for ensuring that JWM's contractual obligations were met and the required work was done. In fact, all of Petitioners' interactions regarding the contracts were solely with McDonald. It was McDonald who rejected modification of the contracts and McDonald who adamantly fought against Petitioners' termination of the contracts. To deal with JWM was, practically speaking, to deal with McDonald.

The argument that McDonald, having availed himself of the corporate form, gives up all rights to sue for distinct injuries under § 1981 is specious. There are numerous instances in which the law disregards the corporate form in cases of wrong-doing by shareholders—especially in cases where the corporation has only one or a few shareholders who are directly implicated in the discrimination or who act as an alter ego for the corporation. *See, e.g. Whidbee v. Garzarelli*

Food Specialties, Inc., 223 F.3d 62, 74-75 (2d Cir. 2000); *O'Connor v. 11 W. 30th St. Restaurant Corp.*, Nos. 94 Civ. 2951, 93 Civ. 8895, 1995 WL 354904, at *4 (S.D.N.Y. Jun. 13, 1995). Likewise, sole corporate shareholders like McDonald must be allowed to invoke the protection of § 1981 when they are themselves the victim of discrimination prohibited by § 1981. It would be odd indeed if the law were construed so that McDonald, as the owner of a corporation, were to be subject to suit under § 1981—and simultaneously left without any remedy at all when he himself is the victim of race discrimination.

Accordingly, the Ninth's Circuit's ruling has a narrow and compelling application where the plaintiff: (1) was the direct target of the discrimination; (2) suffered separate and distinct harm; and (3) owned and operated his business in such a way that to deal with the corporation was essentially to deal with him. As a result, Petitioners' dire predictions about the impact of this case have no basis. There is simply no support in the Ninth Circuit's decision for the claim that "every employee of a large corporation would have standing to bring a lawsuit alleging that his or her employer lost a big contract for racially discriminatory reasons." *See* Pet. Br. at 38. Petitioners and their *amici* are wrong to assert that the decision below opens the federal courts to suits by people whose only claim is that they have suffered because of a violation of some *other* person's right. *See* EEAC Br. at 15. That is not the case at all. Rather, what the Ninth Circuit has done is to ensure that remedies remain available for actual injuries to the human victims of racial discrimination in the making and enforcement of contracts as Congress intended in enacting § 1981.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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